

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

E.I. DUPONT DE NEMOURS & CO.,)	
Employer-Below)	
Appellant,)	
)	
v.)	C.A. No. 04A-12-016 JRJ
)	
GODWIN IGWE,)	
Claimant-Below)	
Appellee)	
)	

Date Submitted: March 9, 2005

Date Decided: August 24, 2005

Appeal From a Decision of the Industrial Accident Board

Decision: Affirmed

OPINION

Robert W. Ralston, Esquire, 10 East 13th Street, Wilmington, Delaware 19899, Attorney for Appellant DuPont de Nemours & Co..

W. Christopher Componovo, Esquire, 1300 Grant Avenue, Suite 101, Wilmington, Delaware 19899, Attorney for Appellee Godwin Igwe.

JURDEN, J.

This is the Court's decision on the Employer DuPont de Nemours & Co.'s appeal of a decision of the Industrial Accident Board granting workers' compensation to the Claimant Godwin Igwe. For the reasons explained below, the Board's decision is **AFFIRMED**.

FACTS

Godwin Igwe (hereafter the "Claimant") was employed in Central Research and Development with E. I. DuPont de Nemours & Co. (hereafter the "Employer"). On March 7, 2002, Claimant suffered an injury to his neck while lifting a heavy thesaurus. In June, 2004, the Claimant filed a petition with the Industrial Accident Board ("the Board") to determine additional compensation due as a result of permanent disability to the cervical spine. The Board conducted a hearing, during which is heard testimony from two physicians. Dr. Stephen Rodgers, a Board Certified physician specializing in occupational medicine and pain management, testified on the Claimant's behalf. Dr. Andrew Gelman, an Orthopedic Surgeon, testified of behalf of the Employer. Both doctors examined the Claimant and reviewed the medical records detailing the treatment rendered to the Claimant following the March, 2002 work accident and the surgery to fuse two disc levels in his neck that was performed in May, 1994. In addition, both doctors testified that they also reviewed the evaluation of permanent impairment performed by a Dr. Polk in Oklahoma five months after the 1994 surgery.

STANDARD OF REVIEW

On appeal, this Court determines whether the agency's decision is supported by substantial evidence and is free from legal error.¹ Substantial evidence is such relevant evidence

¹ *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. Super. 1964); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. Super. 1960).

that a reasonable mind would accept as adequate to support a conclusion.² This Court does not act as the trier of fact, nor does it have authority to weigh the evidence, decide issues of credibility, or make factual conclusions.³ The Court's review of conclusions of law is *de novo*.⁴ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁵

DISCUSSION

On appeal, the Employer first argues that the Board erred by failing to consider unrebutted medical testimony concerning the existence of permanent impairment prior to the 2002 work accident. The Employer also argues that the Board erred as a matter of law in its interpretation of the permanent disability section of the compensation statute that permits awards for separate parts of the body but not separate disc spaces within that same body part. Last, the Employer argues that the Board also erred as a matter of law in failing to adjust or modify the permanent impairment award by the extent to which permanent impairment pre-existed the March 2002 work incident.

The Claimant argues that the Board correctly found that the work accident entitles the Claimant to a 20% permanent impairment rating because the Board has the discretion to weight the credibility of expert witnesses in the case of conflicting testimony and to accept the

² *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. 1994).

³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Super. 1965).

⁴ *Reese v. Home Budget Center*, 619 A.2d 907 (Del. Super. 1992).

⁵ *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

testimony of one witness over another.⁶ The Claimant further argues that the Board did not ignore the idea of apportionment because of the 1994 surgery, and correctly decided that it was unable to adjust the award in light of the facts regarding that issue.

Dr. Rodgers testified that under the Fourth Edition of the AMA Guides, which was the edition used in 1994 to evaluate permanent impairment, the Claimant would have been found to have between an 11% and a 25% permanent impairment of the cervical spine as a result of the disc fusion surgery. However, he also testified that there were new disc problems and radiculopathy that were not present after the 1993 incident. The 1994 surgery affected the levels of C4-5 and C5-6, and an EMG performed in July, 2002 showed a moderate left C7 radiculopathy. Dr. Rodgers arrived at a permanency rating of 20% solely for the injuries that resulted from the 2002 injury, which he did not adjust to account for any permanent impairment that pre-dated the 2002 injury. This decision was based on a number of factors. First, Dr. Polk performed his evaluation five months after the surgery instead of the customary one year. In addition, Dr. Polk arrived at a permanent impairment rating based on whole person impairment and not solely impairment of the cervical spine. Last, there is no evidence to suggest how Dr. Polk arrived at that rating, even taking into account the differences between the current edition of the AMA Guide and the one in effect at the time of Dr. Polk's assessment.

Dr. Gelman testified that a cervical disectomy and fusion at two separate levels of the spine would automatically entitle the Claimant to a permanent impairment of the cervical spine as a result of the 1993 injury and subsequent surgery. Therefore, Dr. Gelman stated that there

⁶ *Reese v. Home Budget Center*, 619 A.2d 907 (Del. Super. 1992).

was a certain level of permanent impairment in the Claimant's cervical spine before the work incident that took place on March 7, 2002. Dr. Gelman further testified that the 2002 work accident did not increase the percentage of permanent impairment to the Claimant's cervical spine.

Based on this evidence, the Board found that the Claimant satisfied his burden of proof and on December 13, 2004 issued an award stating that the Claimant sustained a 20% permanent impairment to the cervical spine as a result of the 2002 work accident. The Board noted that it found Dr. Rodgers's medical testimony to be "persuasive" and, therefore, accepted it over the testimony of Dr. Gelman. In addition, the Board did not modify its award of permanent impairment by the amount of impairment present after the 1994 surgery because the Board felt that there was not "sufficient evidence" to determine the level of permanent impairment that pre-existed the 2002 work accident. For the above reasons, the Board awarded the Claimant a 20% permanent impairment rating for the cervical spine.

The issues boil down to causation and apportionment. As to causation, where there has been an identifiable work accident, compensability is determined by the "but for" standard of causation.⁷ If a worker had a preexisting disposition to a certain physical or emotional injury, whether due to a degenerative disease or a previous accident or injury, an injury attributable to the work accident is compensable if the injury would not have occurred but for the accident. If the accident provides the "setting" or "trigger," causation is satisfied for purposes of

⁷ *Id.* 4.

compensability.⁸ The Board found that the Claimant's injury was compensable because, before the 2002 work accident, the Claimant was not experiencing pain or other symptoms as a result of his earlier injuries. Further, the 2002 work incident also aggravated discs that had not been affected by the Claimant's previous injury or the subsequent surgery, therefore causing both aggravation of a previous injury and an entirely new injury.

As to apportionment, the Board found that it had no reliable figure as to the percentage of permanent impairment that resulted from the 1993 injury and subsequent surgery. Discrepancies between Oklahoma and Delaware regulations on such determinations as well as differences between the 4th and 5th editions of the AMA guide make it impossible to reasonably or accurately arrive at such a figure. Therefore, it could not in good faith reduce the Claimant's award for 20% permanent impairment because of the previous injury. The Court concludes that the Board relied on substantial evidence to find that the 2002 work accident caused the Claimant to suffer a compensable injury and that apportionment is not appropriate.

CONCLUSION

For the foregoing reasons, the Court concludes that there is substantial evidence in the record to support the Board's ruling in this case and accepts the Board's determinations of credibility and fact. The Court, therefore, will not disturb the Board's decision. Accordingly, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

⁸ *Id.* 5 at 910.

Judge Jan R. Jurden